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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BRIEF FOR RESPONDENT WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OPINIONS BELOW

The opinion of the Wisconsin supreme court is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and printed in the petition for writ of certiorari here (P. A-2ff)./[1] The opinion of the Milwaukee circuit

/[1]Following appellants' style, references to pages of the petition will be indicated "P.A. —." Pages in the single appendix will be referenced "A."

court is reported at 88 LRRM 2920, and is printed at P. A-15ff. The decision of the Wisconsin Employment Relations Commission is unreported but is printed here at P. A-22ff.

JURISDICTION

The Attorney General agrees with appellants that jurisdiction is here and has been invoked timely.

QUESTION PRESENTED FOR REVIEW

Is state regulation of union induced concerted refusals to work scheduled overtime pre-empted by the National Labor Relations Act?

STATEMENT OF THE CASE

Kearney & Trecker Corporation (employer) was party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10). The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, although it was executed on August 9, 1972, and contained an expiration date of July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wished to have a 40-hour week with a time-and-a-half pay rate for work over 8 hours in a day and 40 hours in a week. The union wished to retain the prior schedule of 37 ½ hours a week with overtime rates applicable for work over 7½ hours a day and 37 ½ hours in a week.

On March 1, 1972, the employer announced that it was implementing its 40-hour-week proposal effective March 12. On March 7 the union membership authorized a strike, and further resolved that no union member would work overtime, overtime being defined as work in excess of 7 ½ hours a day or 37 ½ hours a week (A. 19-20, 40). Despite its March 1 announcement, the employer did not implement its 40-hour week proposal on March 12 or any time thereafter.

On March 16 the union "remind[ed]" its members that even though negotiations were still underway the "policies" voted on by membership "WILL continue in effect until" a new labor agreement was signed (Ex. 13 (R. 80, 160; A. 26-27)).

Prior to March 7 only five percent of the employes declined overtime work opportunities (A. 22). As many as 354 worked on Saturday, March 4 (Ex. 1 (R. 86, 89, 139-140; A. 30, 33, 51)). From March 11, 1972, until the hearing in July, 1972, no employes worked overtime, with the exception of three employes who worked on May 13, even though the company continued to schedule overtime during this period (A. 26, 28-29, 32). The employer lost control of production as a result (A. 41-46).

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act, 29 U.S.C. sec. 141 *et seq.* (A. 47).

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union and District 10 violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S.C. sec. 158 (b) (3), by requiring the employes not to work overtime. On June 27, 1972, the NLRB Regional Director refused to issue a complaint on the ground that the union's conduct was not prohibited by the National Labor Relations Act. The Regional Director added (A. 53):

> "*** Dismissal by this Agency does not necessarily preclude the Charging Party [i.e., the employer] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). On February 26, 1973, a commission examiner found that the union, but not District 10, had authorized, encouraged and condoned the employes' concerted refusal to work overtime, that the design and effect was to interfere with the employer's production, and that the union had therefore violated sec. 111.06 (2) (h), Wis. Stats., which prohibits a concerted effort to interfere with production except in the case of strikes. The examiner

ordered the union to cease and desist from so authorizing, encouraging and condoning and to take certain other affirmative action (P. A-34, 35). The union's federal pre-emption argument was rejected (P. A-44-48). The commission adopted the examiner's findings, conclusions and order as its own on April 23, 1973 (P. A-23).

The union petitioned the Milwaukee circuit court for review. The commission counter-petitioned for enforcement. Employer intervened. On August 24, 1973, the circuit court entered its memorandum decision rejecting union's federal pre-emption argument (P. A-15-21), and on August 29, 1973, entered its judgment affirming and enforcing the commission's order.

The union appealed to the Wisconsin supreme court. The Wisconsin court unanimously affirmed the Milwaukee circuit court and also rejected the union's federal pre-emption argument (P. A-2-14). The union's motion for rehearing was denied without opinion on May 6, 1975 (P. A-1).

SUMMARY OF ARGUMENT

A concerted refusal to work scheduled overtime is not protected and is not prohibited by the National Labor Relations Act. The concerted refusals here clearly are distinguishable from cases where the Board found protected concerted refusals to volunteer for overtime work on a single weekend. Here, the practice was for the employer to schedule overtime and to permit employes to decline it for reasons acceptable to a supervisor. The employes declined virtually all overtime for over four months.

This distinction makes an important difference and has been made by the Board. For concerted refusals to work scheduled overtime are unprotected because such conduct is inconsistent with a genuine strike and would dictate the employes' own terms of employment. Neither reason is implicated by a refusal to volunteer.

Generally, states may regulate conduct neither protected nor prohibited by the Act. An exception obtains where congress has focused on the particular conduct comprehensively and with particularity and declined to regulate. There has been no such focus here.

These refusals come within the area of coercive and injurious conduct which congress designedly left for the states to regulate. They are governable by the states or are left ungoverned.

The fact that concerted refusals to work overtime are otherwise peaceful and economically motivated does not itself deprive states of jurisdiction. Congress seeks labor peace, not economic warfare. States are excluded from regulating peaceful, economic weaponry only where the same is protected, prohibited or has been the subject of close congressional focus and left permitted.

Legislative history shows no congressional intent to have such concerted refusals be free of all regulation.

ARGUMENT

State Regulation Of Union Induced Concerted Refusals To Work Scheduled Overtime Is Not Pre-empted By The National Labor Relations Act.

A. The Act neither protects nor prohibits such conduct.

The *Garmon*[2] test for federal pre-emption is whether the conduct in question arguably is protected by sec. 7 or prohibited

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[2] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959).

by sec. 8 of the National Labor Relations Act, 29 U.S.C. §§141 *et seq.*, hereafter the "Act."/3

The union does not contend that its conduct is prohibited by the Act. The NLRB's Regional Director determined that it was not prohibited./4 He relied on *NLRB v. Insurance Agents' Union*/5 where this court held not prohibited similar partial strike activity consisting in refusals to solicit business, reporting in late, refusing to perform customary duties, "doing what comes naturally," leaving at noon as a group, and similar "harassing tactics."/6 The Director's determination "illuminated by explanations,"/7 as well as *Insurance Agents'* itself, disposes of any argument that the union conduct is prohibited.

Clear precedent shows the union's conduct is not protected./8 In *Valley City Furniture*/9 a union induced employes to refuse scheduled overtime in response to the employer's unilaterally setting working conditions. The Board held the conduct unprotected because it brought about a

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/3*Garmon* itself gave two formulations: (1) "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 ... or constitute an unfair labor practice under §8 ... state jurisdiction must yield," 359 U.S. at 244; and (2) "When an activity is arguably subject to §7 or §8 of the Act, the States ... must defer to the exclusive competence of the [NLRB]. ..." *Id.*, at 245.

/4A. 52-54.

/5361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

/6*Id.*, 361 U.S. at 480-481.

/7*Cf. Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 192, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965).

/8Although the union emphasizes that the concerted refusal was a decision of the membership, it nowhere faults the finding (P. A-33) of union inducement.

/9110 NLRB No. 216, 35 LRRM 1265, 1266 (1954).

"condition that would be neither strike nor work"; the union was attempting to "dictate the terms and conditions of employment." In *Polytech, Inc.*/10 the Board explained its reasoning:

> "[A] concerted refusal to work overtime was unprotected [because] when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay. The principle ... is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do."

The Eighth Circuit has fashioned this test:/11

> "The test in each case is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime."

The Seventh Circuit is in accord,/12 and this court cited it approvingly in *Briggs-Stratton.*/13

/10195 NLRB No. 126, 79 LRRM 1474, 1475, 1972 CCH NLRB par. 23, 952 (1972).

/11*First National Bank of Omaha v. N.L.R.B.*, 413 F. 2d 921, 925 (8th Cir. 1969).

/12*C.G. Conn., Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *N.L.R.B. v. Kohler*, 220 F. 2d 3, 11 (7th Cir. 1955).

/13*International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 257, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

The union's reliance on *Dow Chemical*/[14] is misplaced. There the practice was for employes wishing to volunteer for weekend work to so indicate. By "refusing to volunteer"/[15] on a single weekend the employes did not seek to impose their own working conditions on the employer, and their refusal was protected.

Dow, therefore, is inapposite for three reasons: (1) it was not union induced, as here;/[16] (2) the Board's ruling concerned the single weekend refusal, and here the refusal lasted over four months;/[17] and (3) the employes refused to volunteer for work whereas here the employes refused scheduled overtime assignments.

Dow expressly distinguished the *Valley Furniture* line of cases where the refusal to work scheduled overtime was unprotected./[18] The union denigrates this distinction in *Dow* itself. In fact, the distinction between failing to volunteer and refusing to work scheduled overtime goes to the heart of the rationales for the rule that a concerted refusal to work scheduled

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/[14]152 NLRB No. 122, 59 LRRM 1279, 1965 CCH NLRB par. 9,390 (1965).

/[15]*Id.*, 59 LRRM at 1281. The union incorrectly says (brief, p. 28) the employes there were free to decline overtime. See *Dow*, n. 3.

/[16]There is a tendency to extend greater protection to nonunion induced conduct. See *Polytech, supra*, where the Board emphasized that the employes were unrepresented and had no grievance procedure. Accord: *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 82 S.Ct. 1099, 8 L.Ed. 2d 298 (1962).

/[17]The Board excepts from its general ban single-refusal conduct as opposed to continuous refusals over a period of time. See *First National Bank of Omaha*, 171 NLRB No. 152, 69 LRRM 1103, 1105, 1968-1 CCH NLRB par. 22,551 (1968), *enforced*, 413 F. 2d 921 (8th Cir. 1969).

/[18]*Dow*, 59 LRRM at 1281.

overtime is unprotected. The rationales are that the latter type is inconsistent with a genuine strike or genuine performance of the work normally expected of employes and consists in union dictation of the workers' terms of employment. A failure to volunteer implicates neither rationale.

Similarly, *Memphis Moldings, Inc.*/[19] does not help the union. An employer, after specifically agreeing with employes that they need not take a truck driving assignment, discharged them for exercising their rights under that agreement. Thus, *Memphis* had nothing to do with refusals to perform regularly scheduled work which is part and parcel of the normal work routine, and simply followed the established rule which protects the exercise of rights under collective agreements./[20]

Thus, far from *Dow* and *Memphis Moldings*, the employer here had every right to expect overtime work, i.e., that the employes collectively would "perform all of the work they were hired to do."/[21] The expired labor agreement reposed scheduling and directing the work force in management./[22] An addendum thereto provided that "when overtime is necessary a job has become critical and nothing can stand in the way of its completion."/[23] Although individuals enjoyed an option to

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/[19]164 NLRB No. 74, 65 LRRM 1108, 1967 CCH NLRB par. 21,239 (1967).

/[20]See *Roadway Express, Inc.*, 217 NLRB No. 49, 88 LRRM 1503, 1505, 1974-75 CCH NLRB par. 15,626 (1975), holding unlawful the discharge of a truck driver who refused to drive an unsafe truck where the contract provided that a driver could refuse to drive an unsafe vehicle.

/[21]*Cf. Polytech, Inc., supra*, note 10.

/[22]Jt. Ex. 1, R. 138, sec. 203, A. 50. Received, R. 59, A. 17.

/[23]A. 50-51.

decline overtime, acceptance of the reasons for declining was up to the supervisors./[24] Compare *John S. Swift Company, Inc.*,/[25] where a concerted refusal to work overtime was unprotected in the case of employes who had previously worked overtime when requested in the absence of a valid personal excuse. Here, there had been only a five percent refusal prior to the overtime ban./[26]

In any event, the Board has since ruled that a concerted refusal to work scheduled overtime is unprotected even if secured by a voluntary right to refuse overtime. *Prince Lithograph Co.*/[27] There, the union had induced a concerted refusal to work overtime. The labor agreement had permitted the right to refuse overtime. The administrative law judge, noting that the Board had held a secondary refusal to work voluntary overtime to be unlawful, held that the union induced refusal was unprotected despite the individual voluntary right to refuse./[28] The Board affirmed.

The union would distinguish *Prince* because the ultimate finding was that the refusal was "not unprotected."/[29] That ultimate finding turned on facts peculiar to that case, namely, a contractual right that overtime could be refused by "any and

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/[24]A. 24.

/[25]124 NLRB No. 46, 44 LRRM 1388, 1390 (1959), *enforced*, 277 F. 2d 641 (7th Cir. 1960).

/[26]A. 22.

/[27]205 NLRB No. 23, 83 LRRM 1654, 1973 CCH NLRB par. 25,614 (1973).

/[28]"If an overtime strike, protected by a voluntary right to refuse overtime, for an unlawful object constitutes a violation ... [then] ... an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision." *Id.*, at 115.

/[29]*Id.*, at 115.

all."/[30] The union's contention that the Board did not adopt the examiner's rationale conflicts with the Board's contrary language./[31] The brief *amicus curiae* on behalf of the Board tucks *Prince* away in a footnote/[32] without denying its holding that the right of an individual to refuse an overtime assignment does not make a concerted refusal protected.

B. The concerted refusals do not come within the area congress designed to be free of all regulation.

These concerted refusals do not come within an area congress wants to be free of all regulation because congress did not focus on this conduct and treat it comprehensively and with particularity.

The primary test for pre-emption is the protected-prohibited test. The early cases used it./[33] *Garmon* refined it./[34] Its basis was avoidance of "threatened interference with the clearly

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/[30]*Id.*

/[31]The Board said it had decided to "affirm the rulings, findings, and conclusions ... and to adopt his recommended Order." *Id.*, at 110. In addition, in note 2, the Board accepted "the reasons given" by the judge.

/[32]Brief, p. 5, n. 4.

/[33]Wisconsin could enjoin mass picketing and like conduct because no employe was "deprived of rights protected" by the Act. *Allen-Bradley Local 1111, etc. Electrical Workers v. Wisconsin E.R. Board*, 315 U.S. 740, 751, 62 S.Ct. 820, 86 L.Ed. 1154 (1942). Florida, however, could not license union business agents because the Act "protect[s]" employes' right to choose their agent. *Hill v. Florida*, 325 U.S. 538, 541, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945). Wisconsin interfered with the exercise of rights "protected by sec. 7" in enjoining a strike by public utility

indicated policy of industrial relations" and the "potential frustration of national purposes" from state action./[35] Twelve years later *Lockridge*/[36] reaffirmed it and noted that a "heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon*,"/[37] because "the federal system dictates that this problem be solved with a rule capable of relatively easy application so that lower courts may largely police themselves."/[38]

Despite its primacy, the protected-prohibited test is not exhaustive./[39] States, for example, may act in matters of genuine local concern, such as violence, even if the violence also is prohibited by the Act./[40] Conversely, states may not act, even if the conduct is neither protected nor prohibited, where congress' occupation of the area by comprehensive regulation shows an intent that the conduct be free of all regulation.

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employes. *Amalgamated Ass'n. of Street Etc. Employees v. Wisconsin E.R. Board (Street Employees)*, 340 U.S. 383, 398, 71 S.Ct. 359, 95 L.Ed. 364 (1951). Wisconsin could, however, enjoin "quickie," or intermittent, strikes which were neither "a right under federal law or a violation of it." *International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 265, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

/[34]See note 2, *supra*.

/[35]*Garmon*, 359 U.S. at 243, 244.

/[36]*Amalgamated Ass'n of Street etc. Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120.

/[37]*Id.*, 403 U.S. at 302.

/[38]*Id.*, at 290.

Morton[41] is the paradigm of this narrow, singularly unique exception to the protected-prohibited test. There, a union's strike aimed to persuade employes of a neutral employer to cease work was unlawful secondary activity. This union also had appealed to a neutral employer directly, rather than through his employes. This latter activity was not unlawful under the Act. Nevertheless, the district court awarded damages under state secondary boycott law. This court reversed even on the assumption that the conduct was neither protected nor prohibited. For congress had considered what conduct could be made the subject of a private damage action "comprehensively and with great particularity,"/[42] and the application of state law to proscribe the "same type of conduct which Congress focused upon but did not proscribe" would "frustrate the congressional determination to leave this weapon of self-help available."/[43]

/[39]*Garmon* said the NLRB might decide that an activity is neither protected nor prohibited and thereby "raise the question" whether the states may act. *Id.*, 359 U.S. at 245. *Briggs-Stratton* noted that the quickie strike was neither a right under nor a violation of the Act, "nor was it legalized." *Id.*, 336 U.S. at 265. Other exceptions, not material here, empower the states to enforce federal contract rights even as to conduct protected or prohibited under the Act. See *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 94 S.Ct. 2069, 2072, 40 L.Ed. 2d 620 (1974).

/[40]*International Union, Etc. v. Russell*, 356 U.S. 634, 641, 78 S.Ct. 932, 2 L.Ed. 2d 1030 (1958), *reh. denied*, 357 U.S. 944, 78 S.Ct. 1379, 2 L.Ed. 2d 1558.

/[41]*Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964).

/[42]*Id.*, 377 U.S. at 258.

/[43]*Id.*, at 259-260.

Here, congress has not focused upon concerted refusals to work overtime with comprehensiveness and particularity as in *Morton*. In fact, such refusals are outside the domain of the Act. They are "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them."/[44] The employes remove themselves from the Act's domain. For by such stoppages "they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay."/[45]

The union nevertheless would find such congressional focus from clearly distinguishable cases like *Dow Chemical*,/[46] where a refusal to volunteer for overtime assignments is protected, and from the protected status of protesting a lawful discharge for refusing to work overtime./[47] This court's holdings on pre-emption, however, have not precluded states from recognizing the differences in situations. In fact, this court's holdings require state courts to make nice distinctions. For example, *Gonzales*/[48] sustained California's damage award to a union member wrongfully expelled from membership, but *Lockridge*/[49] struck

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/[44] *Polytech, Inc.*, 195 NLRB No. 126, 79 LRRM 1474, 1476, 1972 CCH NLRB par. 23,952 (1972). Also see discussion, *supra*, pp. 8-9.

/[45] *Id.* at 1475.

/[46] 152 NLRB No. 122, 59 LRRM 1279, 1965 CCH NLRB par. 9,390 (1965).

/[47] See *N.L.R.B. v. John S. Swift Company*, 277 F. 2d 641, 646 (7th Cir. 1960).

/[48] *International Asso. Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (1958).

/[49] *Amalgamated Ass'n. of Street etc. Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120.

Idaho's award to a union member for expulsion because of a tie-in with construing a union security clause. *Gonzales* was said to involved "tangential and remote" federal principles whereas in *Lockridge* federal concern was "pervasive and its regulation complex."/[50] On the other hand, both *Morton*/[51] and *Hanna Mining*/[52] implicated secondary boycott law. State jurisdiction obtained in *Hanna Mining*, an attempt to organize supervisors, "even if" secondary violations were present,/[53] whereas in *Morton* the states were ousted because the secondary pressure did not come within the ban of the Act, and the conduct there occurred in the context of the traditional strike by employes, "a sphere in which the federal interest is especially pervasive."/[54]

In contrast, it is easy to see that the state has jurisdiction because the concerted refusal to work overtime "finds itself at that far corner of labor law where ... federal occupation is at a minimum."/[55] Indeed, *Briggs-Stratton* holds such refusals to be "comparable" to the quickie strike, which, it is settled, the state can regulate./[56]

/[50] *Id.*, 403 U.S. at 296.

/[51] *Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964).

/[52] *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965).

/[53] *Id.*, 382 U.S. at 192-193.

/[54] *Id.*, at 193, n. 14.

/[55] *Id.*

/[56] 336 U.S. at 257.

C. *These concerted refusals come within the area of coercive conduct which congress left for the states.*

Wisconsin has jurisdiction over the instant concerted refusals to work overtime because they constitute coercive and injurious conduct which congress designedly left to the states.

Briggs-Stratton held that the quickie strike was within the area "Congress designedly left" for the states./[57] "Policing of such conduct is left wholly to the states."/[58] The court rejected the union's argument that such conduct was a protected strike, noting that to define the right to strike to include the quickie strike would legalize "the slowdown and perhaps the sit-down strike as well."[59] *Garner*, ousting states from jurisdiction over areas congress had occupied by providing a centralized agency to deal with the problem, explained:/[60]

> "This is not an instance of injurious conduct which the [NLRB] is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. [Briggs-Stratton.]"

As seen, this is a case in which the NLRB has no power to act./[61]

/[57] *International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

/[58] *Id.*, 336 U.S. at 253.

/[59] *Id.*, at 264.

/[60] *Garner v. Teamsters Union No. 776*, 346 U.S. 485, 488, 74 S.Ct. 161, 98 L.Ed. 228 (1953).

/[61] See discussion, *supra*, pp. 7-13.

The concerted refusal here is the untraditional method of coercion congress meant to leave to the states. In *O'Brien*/[62] this court explained that *Briggs-Stratton* "was not concerned with a traditional, peaceful strike for higher wages." Rather, the conduct was " 'coercive,' similar to the sit-down strike ... and to the labor violence. ..."/[63] Similarly, the overtime strike is not the "traditional, peaceful strike for higher wages" which federal law secures. Rather, it is "inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer."/[64] Therefore, it falls outside the area congress meant to insulate from local regulation and comes within those tactics where "Policing of such conduct is left wholly to the states."/[65]

The union's attempt to distinguish *Briggs-Stratton* on its facts must fail. There, the intermittent work stoppages crippled the employer much like a sit-down strike. Here, the overtime refusals had the same effect without workers assuming the status of strikers. The union emphasizes that the workers' goal was known and predictable./[66] That hardly distinguishes state power under *Briggs-Stratton*, however. Otherwise, an armed seizure of a plant, publicly announced, would be beyond state control.

/[62] *International Union, Etc. v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950).

/[63] *Id.*, 339 U.S. at 459.

/[64] *Polytech, Inc.*, 195 NLRB No. 126, 79 LRRM 1474, 1972 CCH NLRB par. 23,952 (1972). See discussion, *supra*, p. 16.

/[65] *Briggs-Stratton*, 336 U.S. at 253.

/[66] Brief, p. 27.

Briggs-Stratton's basic principles have remained largely intact over the years. Although its "approach" has been questioned,/[67] this court has relied on it to say the federal government is not in the business of "policing the orderly conduct of strikes."/[68] Its statement that " 'Congress designedly left open an area for state control' "/[69] in *Lockridge* became: "We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, *much of this is left to the States.*"/[70] Its general proposition that pre-emption is tested by whether the conduct is protected, prohibited or legalized/[71] is the law today./[72] Its guidepost as to whether state action would interfere with congressional policy/[73] continues to be this court's ultimate guidepost./[74]

/[67]"The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." *Garmon*, 359 U.S. at 245, n. 4.

/[68] *United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed. 2d 379 (1973).

/[69] *Briggs-Stratton*, 336 U.S. at 253.

/[70] *Lockridge*, 403 U.S. at 289. (Emphasis added.)

/[71] 336 U.S. at 265.

/[72] See discussion, *supra*, pp. 14-15.

/[73] *Briggs-Stratton*, 336 U.S. at 256-258.

/[74]"We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, 346 U.S. at 488. "The answer ... ultimately depends upon whether the application of state law ... would operate to frustrate the purpose of the federal legislation." *Morton*, 377 U.S. at 258. "[*Hanna Mining*] accordingly held that the Wisconsin antipicketing statutes — that furthered, not hindered, the Act's — limitations, could be applied to activity by a union of supervisors." *Beasely v. Food Fair of North Carolina*, 416 U.S. 653, 657, 94 S.Ct. 2023, 2026, 40 L.Ed. 2d 443 (1974).

D. Such concerted refusals are not beyond the power of the state to regulate solely because they are economically motivated.

Despite the controlling force of *Briggs-Stratton* the union contends congress desires concerted refusals to work scheduled overtime to be free of any regulation as constituting peaceful, economic warfare. The employer may discharge everyone. The union may strike in return. The employer then could hire strike breakers. This, the union says, is the way congress wants it. The states may not tinker with this delicate economic balance of power.

To be sure, congress left much to the "free play of economic forces."/[75] Such weaponry is " part and parcel of the system,"/[76] and congress has been "rather specific when it comes to outlaw particular economic weapons on the part of unions."/[77]

These principles deny state jurisdiction, however, only where federal occupation of the area is evident from comprehensive regulation of the field/[78] as where congress has "taken in hand this particular type of controversy"/[79] by providing a "detailed prescription of a procedure."/[80] In *Morton* it was in the context of disallowing appeals to employes but allowing them to employers that this court said:/[81]

/[75] *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971).

/[76] *Insurance Agents'*, 361 U.S. at 489.

/[77] *Id.*, 361 U.S. at 498.

/[78] See discussion, *supra*, p. 15.

/[79] *Garner*, 346 U.S. at 488.

/[80] *Id.*, 346 U.S. at 499.

/[81] *Morton*, 377 U.S. at 259.

". . . Allowing its use is a part of the balance struck by Congress between the conflicting interests. . . ."

There has been no such occupation here./[82] Further, *Garner* makes clear that these principles do not oust states from the *Briggs-Stratton* type of coercive or injurious conduct regulable by the states or not at all./[83]

The union's premise that congress wants labor controversies to be settled by unregulable economic weaponry, so long as it is peaceful, is mistaken. Economic warfare is not the congressional goal. "The underlying purpose of this statute is industrial peace."/[84] Congress aims to protect commerce/[85] by securing labor peace./[86] Collective bargaining and concerted

/[82]See discussion, *supra*, p. 16.

/[83]See discussion, *supra*, p. 18.

/[84]*Brooks v. NLRB*, 348 U.S. 96, 103, 75 S.Ct. 176, 99 L.Ed. 125 (1954).

/[85]29 U.S.C. §151, sec. 1 of the Act, provides: "*** It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

/[86]29 U.S.C. §171, sec. 201 of the Act as amended, provides that: "It is the policy of the United States that — (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining...."

activity under the Act serve this end./[87] The choice of weaponry "is not unrestricted. *** [N]ot all forms of economically motivated strikes are protected or even permissible."/[88] Thus, secondary boycott law/[89] outlaws much peaceful, economic weaponry./[90] Peaceful, economic pressures to induce work assignments are banned./[91] Certain picketing for recognition is curtailed./[92] Strikes in violation of contractual no-strike obligations are unprotected/[93] and can be enjoined./[94]

Thus, peaceful, economic weaponry is not talismanic. Before this court has ousted states of jurisdiction it first has ascertained that congress has occupied the area of the particular conduct in question./[95] Where congress has not occupied the area the states have been free to regulate the economic weaponry./[96] Here, the Wisconsin supreme court asserted state power over the narrow area of concerted overtime refusals only after correctly concluding that such conduct is not protected, not prohibited and not the subject of a congressional design to be free of all rule.

/[87]". . .[T]he dual purpose of the Act [is] (1) to protect the right of employees to be free to take concerted action ... and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 284, 76 S.Ct. 349, 100 L.Ed. 309 (1956), *reh. denied*, 351 U.S. 980, 76 S.Ct. 1043, 100 L.Ed. 1495.

/[88]*American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 338, 85 S.Ct. 955, 13 L.Ed. 2d 855 (1965), (Goldberg, J., concurring).

/[89]Sec. 8 (b) (4) (B) of the Act, 29 U.S.C. §158 (b) (4) (B).

/[90]This court described the policies of the secondary boycott law in *N.L.R.B. v. Denver Bldg. & Constr. T. Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), as follows: ". . . the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

The union's reliance on *Insurance Agents'*/[97] as denying state action over similar union harassment is misplaced. The question there was whether the NLRB could hold such tactics to be a violation of the union's duty to bargain in good faith./[98] This court said no because the use of such pressure itself "is not at all inconsistent with the duty of bargaining in good faith."/[99] Such duty simply was not the vessel by which the Board could "distinguish among various economic pressure tactics."/[100] Left untouched were the *Briggs-Stratton* holdings that "Policing of such conduct is left wholly to the states,"/[101] and, as stated in *Garner*, and left unaddressed in *Insurance Agents'*,/[102] that states may regulate injurious or coercive conduct with either is governable by the states or is ungoverned./[103]

The union's reliance on principles of freedom of contract also is misplaced. For those principles only exclude government from dictating contract terms which the parties must agree to./[104]

/[91]29 U.S.C. §158 (b) (4) (D), which is sec. 8 (b) (4) (D) of the Act. In *NLRB v. Plasterers' Local Union*, 404 U.S. 116, 123, 92 S.Ct. 360, 30 L.Ed. 2d 312 (1971), this court said: "Section 8 (b) (4) (D) makes it an unfair labor practice for a labor organization to strike or threaten to coerce an employer or other person in order to force or require an employer to assign particular work to one group of employees rather than to another, unless the employer is refusing to honor a representation order of the Board." This court noted: "It is clear that Congress intended to protect employers and the public from the detrimental economic impact of 'indefensible' jurisdictional strikes." Ibid., 404 U.S. at 130.

/[92]29 U.S.C. §158 (b) (7), which is sec. 8 (b) (7) of the Act.

/[93]*Atlantic Richfield Co.*, 199 NLRB No. 135, 81 LRRM 1412, 1973 CCH NLRB par. 24,763 (1972).

/[94]*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed. 2d 199 (1970).

E. Legislative history does not support an implied exclusion of state regulation of concerted refusals to work scheduled overtime.

The union's recitation of legislative history itself shows that the congressional proposal to ban sit-down strikes or other such concerted interferences was borne of concern that the NLRB had lost sight of congressional antipathy to such conduct./[105] The House report noted that the Board had recently mended its ways, but sceptically suggested the change was inspired "by the public demand."/[106] The conference committee put more stock in the Board's recent decisions./[107]

/[95]In *Morton* this court said: "But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303 'Congress occupied this field and closed it to state regulation.'" *Id.*, 377 U.S. at 258. In *Garner* this court said: "Congress has taken in hand this particular type of controversy." *Id.*, 346 U.S. at 488.

/[96]In addition to *Briggs-Stratton* see *Allen-Bradley*, note 36, *supra*, as to mass picketing and picketing of homes. 315 U.S. at 748. Also see *Hanna Mining*, note 52, *supra*, upholding Wisconsin's injunction against peaceful economic weaponry to organize supervisors even if secondary violations also were present since the "central interests served by the Garmon doctrine were not endangered" and the supervisors were "outside the regime of the Act." *Id.*, 382 U.S. at 192-193. Also see *American Radio Assn v. Mobile Steamship Assn*, 419 U.S. 215, 95 S.Ct. 409, 413, 417, 42 L.Ed. 2d 399 (1974), sustaining Alabama's power to grant American shippers an injunction against picketing of foreign flag vessels even if the dispute with the American shippers were independent of the foreign dispute. Congress simply did not mean to intrude the Act into the accommodations of international maritime trade. See *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 115-116, 94 S.Ct. 959, 39 L.Ed. 2d 195 (1974).

The debate, therefore, had nothing to do with federal preemption of state interests. This is evident from the face of the reports. In addition, the same bill proscribed mass picketing and violence as well,/[108] neither of which specifically was included in

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/[97] *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

/[98] *Id.*, 361 U.S. at 483.

/[99] *Id.*, at 490-491.

/[100] *Id.*, at 492.

/[101] 336 U.S. at 253.

/[102] 361 U.S. at 492, note 23, next to last sentence.

/[103] 364 U.S. at 488.

/[104] See *Porter Co. v. NLRB*, 397 U.S. 99, 108, 90 S.Ct. 821, 25 L.Ed. 2d 146 (1970).

/[105] See *I, Legislative History of the Labor Management Relations Act*, 1947, p. 318.

/[106] *Id.*

/[107] "Under existing principles of law developed by the courts *and recently applied by the Board*, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct... do not have any immunity under the act and are subject to discharge without right of reinstatement." *Id.*, 563. (Emphasis added.)

/[108] *Id.*, 204-205.

the final Act. The union's presumption that congress left all this to free economic warfare is wide of the mark. In short, congress was speaking to the scope of the Act, not federal-state relations.

The union misreads this court's construction of that legislative history. Michigan's strike vote requirement was unconstitutional because of its actual conflict with the Act and federal occupation of the field of strike activity, not because of failure of passage of a bill./[109] Similarly, the strike ban in *Street Employees*/[110] was unconstitutional because it denied a federally protected right, not because a bill failed of passage.

It is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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/[109] *International Union, Etc. v. O'Brien*, 339 U.S. 454, 457-458, 70 S.Ct. 781, 94 L.Ed. 978, n. 5 (1950).

/[110] *Amalgamated Asso. of Street etc. Employees v. Wisconsin E. R. Board (Street Employees)*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951).